IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WILLA DEAN PARKER and ROSE BANKS as successor to Homer Banks, Plaintiffs, v. MERVYN WINWOOD, SPENSER DAVIS, STEVE WINWOOD, THE SPENSER DAVIS GROUP, KOBALT MUSIC PUBLISHING, and UNIVERSAL-SONGS OF POLYGRAM INTERNATIONAL, INC., Defendants.	)	No. 16-cv-00684-JPM-an

ORDER CONCERNING DISPOSITIVE MOTIONS (ECF NOS. 32, 38, 54, & 76)

The cause is before the Court on several Defendants' three motions to dismiss (ECF Nos. 32, 38, and 76) and one motion for summary judgment. (ECF No. 54.) This action arises from the alleged copyright infringement of a riff (a distinct pattern of musical notes) from the song "Ain't That a Lot of Love" in the song "Gimme Some Lovin'." Before the Court are three motions to dismiss (ECF Nos. 32, 38, & 76) and one motion for summary judgment (ECF No. 54). For the reasons stated below, the Court **DENIES** Defendants Stephen ("Steve") Winwood and Kobalt's Motion to Dismiss (ECF No. 32); **GRANTS** Defendant Mervyn Winwood's Motion to Dismiss (ECF No. 76); **GRANTS** in part and **DENIES** in part Defendant Universal's Motion to Dismiss (ECF No. 38); and **GRANTS** summary judgment in favor of Defendants Steve Winwood and Kobalt (ECF No. 54).

I. BACKGROUND

A. Factual Background

Willa Dean Parker and Homer Banks ("H. Banks") co-authored the song "Ain't That a Lot of Love" in 1965. (ECF No. 1 at PageID 4.) The Spenser Davis Group—Spenser Davis, Meryvn Winwood, and Steve Winwood—formed in 1963 in England. (ECF No. 64 ¶ 5.) On April 5, 1966, members of The Spenser Davis Group created "Gimme Some Lovin'." (Id. ¶ 11.)

On April 28, 1966, "Ain't That a Lot of Love" was registered with the US Copyright Office. (ECF No. 64 ¶ 4.)

The Spenser Davis Group toured Europe in 1966 performing the song "Gimme Some Lovin'" and other songs on the album containing "Gimme Some Lovin'." (ECF No. 64 ¶ 9.) The group first recorded "Gimme Some Lovin'" on June 9-10, 14, 1966. (ECF No. 64 ¶ 17.) On September 21, 1966, "Gimme Some Lovin'" was remixed to add piano, percussion, and background vocals along with a new lead vocal by Steve Winwood—the master tap of this recording is dated "21-9-66." (ECF No. 64 ¶ 18.)

On October 7, 1966, "Ain't That a Lot of Love" was released in the United Kingdom. (ECF No. 64 ¶ 25.) "Gimme Some Lovin'" was commercially released in the United Kingdom on October 28, 1966. (ECF No. 64 ¶ 25.)

On March 6, 1967, "Gimme Some Lovin'" was registered with the US Copyright Office. (ECF No. 64 ¶ 3.)

On March 12, 1966 Parker and H. Banks entered into an agreement with East Publications, Inc. The agreement states in relevant part:

> (1) The Writer hereby sells, assigns, transfers and delivers to the Publisher, its successors and assigns all of his rights, title and interest in and to a certain heretofore unpublished original work, as annexed hereto, written and/or composed by Writer, now entitled
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> "AIN'T THAT A LOT OF LOVE"
>
> Including the title, words and/or music thereof, as well as the entire exclusive right to publicly perform and televise, together with the right to accure [sic] copyrights and renewals therein throughout the world, as proprietor in its own name, or otherwise, and to have and to hold the said work, copyrights and renewals thereof and all rights whatsoever nature thereunder existing.
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> . . . .
>
> (3) In consideration of this Agreement, the Publisher agrees to pay the Writer, jointly, only the following royalties: . . . 0.05% per copy, in respect of regular piano copies and/or orchestrations, sold in the United States and for which the Publisher received payment . . . . 50% of the net amount received by the Publisher, in respect to any licenses issued authorizing the manufacture of parts . . . [to] reproduce said word . . . .

(ECF No. 40-1 at PageID 191.) Parker and H. Banks then entered into a Songwriter's Agreement on October 4, 1968. (ECF No. 40-2 at PageID 193.) Similar to the first agreement, this agreement assigned both Parker and H. Banks's rights to East Memphis Music Corp. (Id.) In exchange for the assignment, Parker and H. Banks would receive $0.06 "per copy for each regular piano copy," 10% of wholesale priced copies, in addition to 50% "of all net sums . . . with respect to said composition(s) from any other source or right . . . ." (Id.)

B. Procedural Background

Plaintiffs Willa Dean Parker and Rose Banks, as successors in interest to H. Banks, filed a Complaint for copyright infringement against Defendants on March 29, 2016. (ECF No. 1.) Plaintiffs allege that Defendants Mervyn Winwood, Steve Winwood, Spenser Davis, The Spenser Davis Group, Kobalt Music Publishing ("Kobalt"), and Universal Songs of Polygram International, Inc. ("Universal") (collectively, "Defendants") infringed Plaintiffs' "Ain't That a Lot of Love" copyright. (Id. ¶ 12.) Plaintiffs specifically allege that Defendants (1) had access to "Ain't That a Lot of Love" prior to creating "Gimme Some Lovin'," and (2) knowingly incorporated the "riff" (a distinct note pattern) from Plaintiffs' song in "Gimme Some Lovin'." (Id. ¶¶ 35-36.)

On August 5, 2016, Defendants Steve Winwood and Kobalt filed a Motion to Dismiss. (ECF No. 32.) Plaintiffs filed a response in opposition on August 16, 2016. (ECF No. 34.) With leave of Court, Defendants Steve Winwood and Kobalt filed a reply on September 14, 2016. (ECF Nos. 42 & 43.)

On August 30, 2016, Defendant Universal filed a Motion to Dismiss. (ECF No. 38.) On September 15, 2016, Plaintiffs filed a response in opposition. (ECF No. 44.) With leave of Court, Universal filed a reply on October 5, 2016. (ECF Nos. 46, 48.)

On October 12, 2016, Defendants Steven Winwood and Kobalt moved for "Leave to File a Response to Defendant [Universal]'s Reply to Plainitffs' Response in Opposition to [Universal's] Motion to Dismiss." (ECF No. 49.) The Court granted leave to file a response no later than October 26, 2017. (ECF No. 51.) Defendants Steven Winwood and Kobalt did not file a response.

On February 7, 2017, Defendants Steve Winwood and Kobalt filed a Motion for Summary Judgment. (ECF No. 54.) Plaintiffs filed a response in opposition on February 28, 2017. (ECF No. 64.) Defendants Steve Winwood and Kobalt filed a reply on March 17, 2017. (ECF No. 72.)

On April 17, 2017, Defendant Mervyn Winwood filed a timely Motion to Dismiss. (ECF Nos. 63, 71, 73, 76.) Plaintiffs filed a response in opposition on April 28, 2017. (ECF No. 86.) Defendant Mervyn Winwood filed a reply on May 12, 2017. (ECF No. 89.)

On July 11, 2017, Defendants Steve Winwood, Mervyn Winwood, and Kobalt filed a Motion to Extend Deadlines. (ECF No. 90.) Plaintiffs filed a response in opposition on July 12, 2017. (ECF No. 91.)

II. LEGAL STANDARD

A. Motion to Dismiss for Failure to State a Claim

Fed. R. Civ. P. 12(b)(6) allows dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." As such, a Rule 12(b)(6) motion permits the "defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993) (citing Nishiyama v. Dickson Cnty., 814 F.2d 277, 279 (6th Cir. 1987)).

When evaluating a motion to dismiss for failure to state a claim, the Court must determine whether the complaint alleges "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). If a court decides in light of its judicial experience and common sense, that the claim is not plausible, the case may be dismissed at the pleading stage. Iqbal, 556 U.S. at 679. The "[f]actual allegations must be enough to raise a right to relief above [a] speculative level." Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 548 (6th Cir. 2007) (quoting Twombly, 550 U.S. at 555). A claim is plausible on its face if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556). A complaint need not contain detailed factual allegations. However, a plaintiff's "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. When deciding a 12(b)(6) motion to dismiss, the court may look to "matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint" for guidance. Barany-Snyder v. Weiner, 539 F.3d 327, 332 (6th Cir. 2008) (quoting Amini v. Oberlin Coll., 259 F.3d 493, 502 (6th Cir. 2001)).

B. Motion to Dismiss for Lack of Personal Jurisdiction

The court must have personal jurisdiction over each asserted claim. SunCoke Energy Inc. v. MAN Ferrostaal Aktiengesellschaft, 563 F.3d 211, 220 (6th Cir. 2009) (White, J., concurring) ("[P]ersonal jurisdiction must be proper as to each claim. . . ."). A federal court looks to the long-arm statute of the state in which it sits to determine the appropriate limitations on personal jurisdiction, then assesses the exercise of jurisdiction, if any, under due process requirements. Federal Rule of Civil Procedure 4(k)(1)(a); see Aristech Chem. Int'l Ltd. v. Acrylic Fabricators, Ltd., 138 F.3d 624, 627 (6th Cir. 1998); CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996); Bird v. Parsons, 289 F.3d 865, 871 (6th Cir. 2002). The jurisdictional limits of Tennessee law and of the federal constitutional law of due process are identical. Intera Corp. v. Henderson, 428 F.3d 605, 616 (6th Cir. 2005); First Cmty. Bank, N.A. v. First Tennessee Bank, N.A., 489 S.W.3d 369, 384 (Tenn. 2015), cert. denied sub nom. Fitch Ratings, Inc. v. First Cmty. Bank, N.A., 136 S. Ct. 2511, 195 L. Ed. 2d

841 (2016); Tenn. Code Ann. § 20-2-223(a).[1] Thus, the Court need only determine whether exercising personal jurisdiction over the defendant is consistent with federal due process requirements. Bridgeport Music, Inc. v. Still N The Water Pub., 327 F.3d 472, 477 (6th Cir. 2003). The due process clause requires that a non-resident defendant have at least "certain minimum contacts with the [forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Youn v. Track, Inc., 324 F.3d 409, 417 (6th Cir. 2003) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

"There are two kinds of personal jurisdiction within the Federal Due Process inquiry: (1) general personal jurisdiction, where the suit does not arise from defendant's contacts with the forum state; and (2) specific jurisdiction, where the suit does arise from the defendant's contacts with the forum state." Conn v. Zakharov, 667 F.3d 705, 712–13 (6th Cir. 2012). General jurisdiction allows a plaintiff to sue a defendant "on any and all claims," regardless of the connection (or lack thereof) between the claim and the forum. Maxitrate Tratamento Termico E Controles v. Super Sys., Inc., 617 F. App'x 406, 408 (6th Cir. 2015), cert. denied sub nom. Maxitrate Tratamento Termico E Controles v. Allianz Seguros S.A., 136 S. Ct. 336 (2015) (citing Daimler AG v. Bauman, 134 S. Ct. 746, 769 (2014)). Specific jurisdiction, by contrast, "exposes the defendant to suit in the forum state only on claims that arise out of or relate to a defendant's contacts with the forum." Kerry Steel, Inc. v. Paragon Indus., Inc., 106

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[1] Tenn. Code Ann. § 20-2-223(a) states in pertinent part:

> (a) A court may exercise personal jurisdiction over a person, who acts directly or indirectly, as to a claim for relief *arising from* the person's:
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> > (1) Transacting any business in this state;
> > (2) Contracting to supply services or things in this state;
> > (3) Causing tortious injury by an act or omission in this state;
> > (4) Causing tortious injury in this state by an act or omission outside this state of the person who regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;
>
> . . . .

Tenn. Code Ann. § 20-2-223(a) (emphasis added).

F.3d 147, 149 (6th Cir. 1997). That is, when alleged contacts fall short of being "continuous and systematic," those contacts may still support the exercise of specific jurisdiction if they relate to the cause of action. The Sixth Circuit Court of Appeals has set out a three-part test for determining when specific jurisdiction exists:

> First, the defendant must purposefully avail [himself] of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

S. Mach. Co. v. Mohasco, 401 F.2d 374, 381 (6th Cir. 1968); [2] see also Harmer v. Colom, 650 F. App'x 267, 272 (6th Cir. 2016).

When a defendant challenges personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), "[t]he plaintiff bears the burden of making a prima facie showing of the court's personal jurisdiction over the defendant." Intera Corp. v. Henderson, 428 F.3d 605, 615 (6th Cir. 2005). A plaintiff "can meet this burden by 'establishing with reasonable particularity sufficient contacts between [a defendant] and the forum state to support jurisdiction.'" Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 887 (6th Cir. 2002) (quoting Provident Nat'l Bank v. Cal. Fed. Sav. Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987)).

When the court does not conduct an evidentiary hearing on the issue of personal jurisdiction, it must "not consider the facts proffered by the defendant that conflict with those offered by the plaintiff, and will construe the facts in the light most favorable to the nonmoving party." Id. (citation omitted).

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[2] Since the Sixth Circuit espoused this test, the Tennessee long-arm statute changed "from a 'single act' statute [in which jurisdiction was assumed only over causes of action arising out of the defendant's activities in the state] to a 'minimum contacts' statute which expanded the jurisdiction of Tennessee courts to the full limit allowed by due process." UPS v. Buck Fever Racing, Inc., No. 03A01-9609-CH-00288, 1996 WL 739296, at *2 (Tenn. Ct. App. Dec. 24, 1996). Nonetheless, the three-part test is "to be considered in determining whether the requisite minimum contacts [are] present. . . ." Id.

C. Summary Judgment

Under Federal Rule of Civil Procedure 56, summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists for trial "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The initial burden rests on the moving party to show that there is no dispute regarding any genuine issue of material fact, and this burden can be met by demonstrating that there is no evidence underlying the nonmoving party's case. Slusher v. Carson, 540 F.3d 449, 453 (6th Cir. 2008). When confronted with a properly-supported motion for summary judgment, the nonmoving party must "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Abeita v. TransAm. Mailings, Inc., 159 F.3d 246, 250 (6th Cir. 1998). "Once the moving party satisfies its initial burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue of material fact." Mosholder v. Barnhardt, 679 F.3d 443, 448-49 (6th Cir. 2012). In reviewing a motion for summary judgment, the court must view the evidence "in the light most favorable to the nonmoving party, and draw all reasonable inferences in that party's favor." Smith v. Perkins Bd. of Educ., 708 F.3d 821, 825 (6th Cir. 2013) (quoting Slusher, 540 F.3d at 453); see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

"The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). "[T]he district court has no 'duty to search the entire record to establish that it is bereft of a genuine issue of material fact.'" Pharos Capital Partners, L.P. v. Deloitte & Touche, 535 F. App'x 522, 523 (6th Cir. 2013) (per curiam) (quoting Tucker v. Tennessee, 539 F.3d 526, 531 (6th Cir. 2008), abrogation recognized by Anderson v. City of Blue Ash, 798 F.3d 338 (6th Cir. 2015)). "'[J]udges are not like pigs, hunting for truffles' that might be buried in the record." Emerson v. Novartis Pharm. Corp., 446 F. App'x 733, 736 (6th Cir. 2011) (alteration in original) (quoting United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991)). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52. "[A] mere 'scintilla' of evidence in support of the non-moving party's position is insufficient to defeat summary judgment; rather, the non-moving party must present evidence upon which a reasonable jury could find in her favor." Tingle v. Arbors at Hilliard, 692 F.3d 523, 529 (6th Cir. 2012) (quoting Anderson, 477 U.S. at 251).

III. ANALYSIS

A. Defendants Steve Winwood and Kobalt Music Publishing's Motion to Dismiss for Failure to State a Claim (ECF No. 32)

Defendants Steve Winwood and Kobalt Music Publishing move to dismiss Plaintiffs' Complaint for failure to state a claim because Plaintiffs purportedly failed "to allege, nor can they allege, that they complied with the statutory formalities required under the applicable U.S. Copyright law, 17 U.S.C. § 13 (1909), to enable them to bring this action." (ECF No. 33 at PageID 115.) Winwood and Kobalt specifically contend that because the work-at-issue was initially registered as an unpublished work, the 1909 Act required Plaintiffs to re-register the work upon publication and to make "prompt delivery" of two deposit copies of the work. (Id. at PageIDs 117-18.) Plaintiffs contend the Complaint does not allege the work-at-issue is published as defined by 17 U.S.C. § 303, and thus they were not required to re-register. (ECF No. 34 at PageID 121.) Even if the work had been published, Plaintiffs argue, the 1909 Act does not require re-registration or deposit copies; rather, deposit copies are required only upon demand by the Copyright Office, of which there was none here. (Id. at PageID 122.)

Because "Ain't That a Lot of Love" was created and registered prior to the effective date of the 1976 Copyright Act, publication and registration issues as to "Ain't That a Lot of Love" are governed by the 1909 Copyright Act. Dolman v. Agee, 157 F.3d 708, 712 n. 1 (9th Cir. 1998). The general rule under the 1909 Act was that the publication of a work with proper notice was necessary to obtain statutory copyright protection. See Stewart v. Abend, 495 U.S. 207, 233 (1990). Deposit of a copy of the published work with the Copyright Office was not necessary to obtain statutory protection. Washingtonian Pub. Co. v. Pearson, 306 U.S. 30, 37 (1939) ("It is no longer necessary to deposit anything to secure a copyright of a published work, but only to publish with the notice of copyright."). Nor did the failure to promptly deposit copies upon publication foreclose a right to sue for infringement. Id. at 39, 42. However, no copyright infringement action could be brought before the deposit was made and the work was registered. Act of March 4, 1909 ("1909 Act"), ch. 320, § 12, 35 Stat. 1075, 1078. Copyright protection could be forfeited for failure to provide deposit copies of the work to the Copyright Office, but only if the Register of Copyrights "upon actual notice" demanded deposit and the copyright holder failed to comply. 1909 Act, § 13, 35 Stat. 1075, 1078.

"Publication" is not expressly defined in the 1909 Act. However, the "date of publication" is defined "in the case of a work of which copies are reproduced for sale or distribution [as] the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority." 1909 Act, § 62, 35 Stat. 1075, 1087–88. An unpublished composition could be protected under the statutory scheme if its owner "deposit[s] a manuscript copy of the music as an unpublished work prior to the sale of records." See M. Nimmer & D. Nimmer, 1 Nimmer on Copyright ("Nimmer") § 4.05[B][4] at 4–35; see also id. § 7.16[A][2] [c][ii] at 7.151 ("statutory copyright protection for unpublished works could be claimed under the 1909 Act only by registration and deposit under Section 12."); 1909 Act, §§ 11–12, 35 Stat. 1075, 1078.

Under the 1909 Act, the act of recording or distributing recordings does not constitute the publishing of a composition. Instead, "in order to claim copyright in a musical work under the 1909 Act, the work had to be reduced to sheet music or other manuscript form." Nimmer § 2.05[A] at 2–55. In 1997, Congress amended the 1976 Copyright Act to provide that "[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein." 17 U.S.C. § 303(b) (1997).

For these reasons, under the relevant provisions of the 1909 Act, Plaintiffs could have obtained statutory copyright protection for their work in one of two ways: (i) publishing it with the proper notices; or (ii) composing, but not publishing it, and making the necessary deposits with the Copyright Office. See Twentieth Century–Fox Film Corp. v. Dunnahoo, 637 F.2d 1338, 1342 (9th Cir. 1981) ("[T]he deposit requirement is merely a limitation on the ability to bring an action for infringement at a particular time.").

Although Defendants proffer evidence that the work was distributed as a phonorecord prior to 1978, the Copyright Act specifically states that the distribution of phonorecords prior to 1978 is not considered a publication under copyright law. See 17 U.S.C. § 303. Even if the work-at-issue had been published, however, Plaintiffs would not be foreclosed from bringing an infringement suit so long as they made the requisite deposit. The right to sue is not destroyed for failure to make a prompt deposit after publication. Accordingly, the Court **DENIES** Defendants Steve Winwood and Kobalt Music Publishing's Motion to Dismiss (ECF No. 32).

B. Defendant Mervyn Winwood's Motion to Dismiss for Lack of Personal Jurisdiction and Insufficient Service of Process (ECF No. 76)

Defendant Mervyn Winwood moves to be dismissed from this action because he lacks "sufficient minimum contacts with the state of Tennessee," has no "'continuous and systematic' contacts with the state of Tennessee," and has not "avail[ed] himself of the privileges of acting or causing consequence in Tennessee. . . ." (ECF No. 76 at PageIDs 619-20.) Mervyn Winwood further contends he "was not properly served with service of process." (Id. at PageID 620.) Plaintiffs counter that Mervyn Winwood's actions gave rise to this suit, invoking specific jurisdiction, and he was properly served. (ECF No. 86 at PageID 661.) Defendant Mervyn Winwood contends that Plaintiffs have failed to meet their burden of proof, because they rest their allegations on their pleadings but not on evidence or affidavits. (ECF No. 89 at PageIDs 702-03.) The Court agrees with Defendant Mervyn Winwood.

"The party seeking to assert personal jurisdiction bears the burden of demonstrating that such jurisdiction exists." Youn v. Track, Inc., 324 F.3d 409, 417 (6th Cir. 2003) (citing Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883 (6th Cir. 2002)); see also Bird v.

Parsons, 289 F.3d 865 (6th Cir. 2002); Schneider v. Hardesty, 669 F.3d 693 (6th Cir. 2011). To do so, "plaintiff bears the burden of establishing through 'specific facts' that personal jurisdiction exists over the non-resident defendant. . . ." Conn v. Zakharov, 667 F.3d 705, 711 (6th Cir. 2012) (citing Kroger Co. v. Malease Foods Corp., 437 F.3d 506, 510 & n.3 (6th Cir. 2006); Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991)). When ruling on a motion to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2) without an evidentiary hearing or discovery, "the court must consider the pleadings and affidavits in a light most favorable to the plaintiff," CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996), and it cannot "weigh the controverting assertions of the party seeking dismissal," Theunissen, 935 F.2d at 1459. Though the plaintiff need only make a *prima facie* showing of jurisdiction to defeat the motion, it "may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction." Id. at 1458.

In the instant case, Plaintiffs assert that Defendant Mervyn Winwood's "agents regularly conduct business in Nashville, Tennessee on Defendant's behalf through the direct and indirect licensing of rights to perform, publish, market, distribute, sell, or otherwise disseminate the song "Gimme Some Lovin'." (ECF No. 86 at PageID 662.) Plaintiffs' sole support for this assertion is by reference to the Complaint, which makes the same conclusory allegation without evidentiary support, and a footnote alleging "Defendants have licensed their song to local recording artists . . . ."[3] (Id. (citing ECF No. 1 ¶ 12; DEBRA LYN, GIMME SOME LOVIN, (Palette Records 2016); and Songwriters in the Round, Gimme

[3] Plaintiff also makes reference to Defendants Steve Winwood and Kobalt Music Publishing's Response to Plaintiffs' Statement of Additional Material Facts (ECF No. 77-2) and well as the Declaration of Stephen Winwood (ECF No. 86-1). (See ECF No. 86 at PageIDs 662, 666-68.) Because neither of these filings speak to any actions by Defendant Winwood, Plaintiffs' reference to them is unpersuasive.

Some Lovin, YOUTUBE (March 25, 2016) https://www.youtube.com/watch?v=1kayEuAG6nw).) First, Plaintiffs' reference to their pleading does not defeat the motion. Theunissen, 935 F.2d at 1458. Moreover, reference to a song—not in the record—by other artists does not provide specific fact showing that the court has jurisdiction over Defendant Mervyn Winwood. Id. Accordingly, because Plaintiffs have failed to set forth specific facts showing that the Court has personal jurisdiction over Defendant Mervyn Winwood, the Court need not address whether Defendant Mervyn Winwood was properly served with service of process. For these reasons, the Court **GRANTS** Defendant Mervyn Winwood's Motion to Dismiss (ECF No. 76).

C. Defendant Universal's Motion to Dismiss for Failure to State a Claim (ECF No. 38)

Defendant Universal moves to dismiss Plaintiffs' Complaint for failure to state a claim on three grounds: (1) Plaintiffs' lack of standing, (2) Universal is a common owner of the copyright and thus cannot infringe its own copyright, and (3) if Universal does not directly infringe, neither Defendants Mervyn Winwood nor Spencer Davis can contributorily infringe. (ECF Nos. 38 and 39 at PageIDs 179 and 182-83.) The Court addresses each argument in turn.

1. Standing

Universal argues that Plaintiffs lack standing to bring this copyright infringement action because they do not own the copyright to "Ain't That A Lot of Love." (ECF No. 39 at PageID 174.) Plaintiffs relinquished their ownership as co-authors, Universal argues, when they assigned their rights to East Memphis Music Corp. (Id. (citing to Compl. Exs. A and B; Schaffer Decl. A-E).) Plaintiffs concede that "East [Memphis Music Corp.] is the legal title and copyright claimant and [that Plaintiffs] are the works' authors." (ECF No. 44 at PageID

332.) Plaintiffs allege that, despite East Memphis Music Corp.'s title, they are "beneficial owners of the copyrighted work" because Deanie Parker and Homer Banks "exchange[d] legal title to [the] copyright for royalty payments." (Id. at PageID 329.)

A court's determination of whether a plaintiff has standing is antecedent to any declaratory judgment determination. A court must first satisfy itself that "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

Under § 501(b) of the 1976 Copyright Act, which "merely codified the case law that had developed under the 1909 Act with respect to the beneficial owner's standing to sue[,] . . . '[t]he legal or beneficial owner of an exclusive right under a copyright' is entitled to sue for infringement." Cortner v. Israel, 732 F.2d 267, 271 (2d Cir. 1984) (quoting 17 U.S.C.A. § 501(b)). "A 'beneficial owner' for this purpose would include, for example, an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees." Id. (citing the legislative records of the Act and quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 159, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5775 (internal quotations omitted)); accord Warner/Chappell Music, Inc. v. Blue Moon Ventures, No. 3:10-1160, 2011 WL 662691, at *3 (M.D. Tenn. Feb. 14, 2011). "To the extent that a beneficial owner's standing to sue differs between the 1909 Act and the [1967] Act, the latter applies to causes of action arising after January 1, 1978, even if the instrument creating such beneficial interest was executed pre–1978." 1 Nimmer on Copyright § 12.02[C] at n.35. Accordingly, for alleged infringement after the effective date of the 1976 Act, there is no requirement that a beneficial owner join the legal owner; whereas for alleged infringement prior to 1978, a beneficial owner is required to join the legal owner in a suit. See Walker v. Univ. Books, Inc., 602 F.2d 859, 862 (9th Cir. 1979).

In the instant case, the agreements between Deanie Parker, Homer Banks, and East Memphis Music Corp. transferred legal title to the copyright in exchange for percentage royalties based on sales and/or license fees. Accordingly, because the 1966 agreement contemplated royalties based on sales and license fees, and the 1968 agreement contemplated royalties based on sales, the Court finds Deanie Parker and Homer Banks constituted beneficial owners to the copyrighted work. Rose Banks, as Homer Banks's successor in interest, is now a beneficial owner in Homer Banks's place. Moreover, because Deanie Parker and Rose Banks constitute beneficial owners to the copyrighted work, and the Complaint alleges infringement for "the preceding three years" (ECF No. 1 at PageID 8), the Court finds they have standing to bring their copyright infringement claims under the 1976 Copyright Act.[4]

2. Direct Infringement

Universal further contends that it cannot be liable for infringement because its "sister Company, Rondor Music International, Inc. owns all rights in and to the copyright for 'Ain't That A Lot of Love,'" and thus it has "common ownership" that allows it "to license the performances, publication, marketing, distribution, sale, or other Dissemination" of the work "or its derivative works . . . ." (ECF No. 39 at PageID 182.) Plaintiffs counter that they were required by the 1909 Act to sue the legal title owner as a defendant. (ECF No. 44 at PageID

[4] The instant claims allege infringement for "the preceding three years" and therefore are governed solely by the 1976 Copyright Act. Accordingly, the Court need not determine whether Plaintiffs have standing as beneficial owners under the 1909 Copyright Act.

332.) Plaintiffs further contend Universal can be sued for copyright infringement even as an owner for violation of its fiduciary duty to Plaintiffs. (Id. at PageID 333.) Plaintiff also argue that Universal should remain in this action as an indispensable and necessary party. (Id.) Universal responds that Plaintiffs cannot allege a breach of fiduciary duty, when no such claim was made in the Complaint. (ECF No. 48 at PageIDs 345.)

Having found above that Plaintiffs were not required to sue the legal owner of the copyright to bring suit for infringement occurring in the preceding three years, the Court rejects Plaintiffs' argument that it was required to do so. The Court also rejects Plaintiffs' argument that Universal owed Plaintiffs a fiduciary duty as a co-owner of the copyright and breached that duty. Plaintiffs failed to allege a breach of fiduciary duty in the Complaint, and thus such a claim cannot be considered. Nor is the Court persuaded by Plaintiffs' argument that Universal is a necessary defendant[5] in this action. "[A] copyright owner can not infringe upon the particular interest owned by him; nor can a joint copyright owner sue his co-owner for infringement." Fantasy, Inc. v. Fogerty, 654 F. Supp. 1129, 1130-31 (N.D. Cal. 1987) (citing Cortner v. Israel, 732 F.2d 267, 271 (2nd Cir.1984); Oddo v. Ries, 743 F.2d 630, 633 (9th Cir.1984)). Accordingly, Universal is more than just an unnecessary defendant, but an impermissible defendant for infringement in this action. For these reasons, the Court **GRANTS** Universal's Motion to Dismiss Plaintiffs' claims of direct infringement against it.

3. Contributory Infringement

Last, Universal argues that "[w]ithout direct infringement by [it], Plaintiffs cannot establish secondary infringement on the part of Mervyn Winwood or Spenser Davis and such

[5] Some courts have found that a co-owner may constitute a necessary and indispensable party that should be joined as a co-plaintiff. See, e.g., Kernel Records Oy v. Mosley, No. 09-21597-CIV-TORRES, 2010 WL 2812565, at *16 (S.D. Fla. July 5, 2010).

claims should be dismissed." (ECF No. 39 at PageID 184.) Neither Mervyn Winwood nor Spenser Davis, however, joined Universal in this motion. Accordingly, the Court will not address defenses invoked by a party to whom the defense does not apply. Universal's Motion to Dismiss these contributory infringement claims against Mervyn Winwood and Spenser Davis is **DENIED**.

In sum, the Court **GRANTS** in part and **DENIES** in part Defendant Universal's Motion to Dismiss (ECF No. 38).

Having dismissed Mervyn Winwood for lack of personal jurisdiction and claims for direct infringement against Universal, the Court addresses Defendants Steve Winwood and Kobalt's Motion for Summary Judgment (ECF No. 54) as to the remaining claims against Defendants Spenser Davis, Steve Winwood, The Spenser Music Group, and Kobalt.

D. Defendants Steve Winwood and Kobalt's Motion for Summary Judgment (ECF No. 54)

Defendants Steve Winwood and Kobalt move to dismiss Plaintiffs' copyright infringement claim because "their composition, "Gimme Some Lovin", the allegedly infringing work, was [allegedly] written and recorded before Plaintiff's song was ever recorded and released . . . ." (ECF No. 55 at PageID 371.) Specifically, Defendants Steve Winwood and Kobalt allege that '"Gimme Some Lovin' was independently co-written by Steve Winwood, MervynWinwood, and Spencer Davis on April 5, 1966 at the Marquee Club in London, England," before the October 7, 1966 release of "Ain't That a Lot of Love" in the United Kingdom. (Id. at PageIDs 373, 375.) Defendants Steve Winwood and Kobalt further argue that they "did not have a 'reasonable possibility' of access to Plaintiffs' song before they created and recorded 'Gimme Some Lovin', [and thus] they could not have copied its bass riff." (Id. at PageID 372.) Defendants support this contention by asserting that it would have been infeasible to have infringed Plaintiffs' song between its release in the United Kingdom on October 7, 1966 and Defendants' release of "Gimme Some Lovin'" on October 28, 1966. (Id. at PageIDs 373, 375.) Plaintiffs counter that "[c]opies of 'Ain't That a Lot of Love,' as independently recorded by David Porter, were available in the United Kingdom as early as 1965." (ECF No. 64-6 at PageID 542.) Plaintiffs further contend Spenser Davis admitted in several interviews that "Gimme Some Lovin'" is based on Plaintiffs' song. (Id. at PageIDs 542-44.) Plaintiffs also argue that "Defendants' Motion raises questions of fact regarding when Defendants were first exposed to Plaintiffs' work and, supposing the commercial release of the Homer Banks' recording was the earliest time at which Defendants could have heard 'Ain't That A Lot of Lov[e],' [and] the feasibility of infringement within the twenty-one days between the release of Banks' recording and 'Gimme Some Lovin.'" (Id. at PageID 64-66.) Defendants counter that Plaintiffs' evidence regarding the David Porter's recording in 1965 as well as Defendant Davis's interviews constitute inadmissible hearsay. (ECF No. 72 at PageIDs 578, 580-81.) The Court first addresses the admissibility of Plaintiffs' evidence and then whether there exists no dispute of a material fact.

The evidence challenged as hearsay includes an online article regarding David Porter, three articles including interviews with Defendant Davis, and one article including an interview with Jim Capaldi. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Ev. 801(c). Hearsay is generally inadmissible and cannot be considered in evaluating pending summary judgment motions. Fed. R. Ev. 802. Newspaper articles are typically considered hearsay under Rule 801(c) when offered for the truth of the matter asserted. See Roberts v. City of Shreveport, 397 F.3d 287, 295 (5th Cir. 2005) (Newspaper articles are not proper summary judgment evidence to prove the truth of the facts that they report because they are inadmissible hearsay); United States ex rel. Woods v. Empire Blue Cross and Blue Shield, No. 99 Civ. 4968(DC), 2002 WL 1905899, * 1, n.1 (S.D.N.Y. Aug. 19, 2002); In re Columbia Securities Litigation, 155 F.R.D. 466, 474 (S.D.N.Y. 1994) (holding that press reports were hearsay because they were out-of-court statements offered to prove the truth of the matter asserted). "Even when the actual statements quoted in a newspaper article constitute nonhearsay, or fall within a hearsay exception, their repetition in the newspaper creates a hearsay problem." Stewart v. Wachowski, 574 F. Supp. 2d 1074, 1090 (C.D. Cal. 2005); see Larez v. Los Angeles, 946 F.2d 630, 642 (9th Cir. 1991) ("As the reporters never testified nor were subjected to cross-examination, their transcriptions of Gates's statements involve a serious hearsay problem"). Thus, statements in newspapers often constitute double hearsay. See United States Football League v. Nat'l Football League, 1986 WL 5803, at *2 (S.D.N.Y. May 16, 1986) (holding that statements of belief by unknown declarants reiterated in a newspaper article constituted hearsay within hearsay); Almond v. ABB Industrial Sys., Inc., 2001 WL 242548, at *8 (S.D. Ohio March 6, 2001) (holding that copies of magazine articles are "clearly inadmissible hearsay," sometimes containing "double hearsay" problems); Brumley v. Albert E. Brumley & Sons, Inc., No. 3:08-CV-1193, 2010 WL 1439972, at *6 (M.D. Tenn. Apr. 9, 2010) (highlighting potential double hearsay problem invoked by transcripts of an interview, book experts, and various magazine articles). Similarly, statements taken from the internet are hearsay when offered to prove the truth of the matter asserted. Stewart, 574 F. Supp. at 1090; Woods v. Slater Transfer & Storase, Inc., No. 2:08-CV-00948-GWF, 2010 WL 3433052, at *4 (D. Nev. Aug. 27, 2010).

Accordingly, the Court finds the articles proffered by Plaintiffs constitute inadmissible hearsay that cannot be considered at the summary judgment stage. Having disregarded this evidence, the Court turns to whether there is a genuine dispute of any material fact and whether Defendants are entitled to judgment as a matter of law.

The Court finds no dispute of material fact still exists regarding whether Defendants had a "reasonable possibility" of access to Plaintiffs' song before they created "Gimme Some Lovin'." Specifically, the Court finds Plaintiffs have failed to meet their burden to show that there is a dispute regarding whether Defendants infringed Plaintiffs' song between its release date on October 7, 1966 in the United Kingdom (ECF No. 64 ¶ 25) and the release date of "Gimme Some Lovin'" on October 28, 1966 (ECF No. 64 ¶ 25), or at any time before that date. Defendants presented evidence in the form of affidavits that the members of The Spenser Davis Group had not heard Plaintiffs' song prior to creating "Gimme Some Lovin'." (Mervyn Winwood Decl., ECF No. 57 ¶ 5; Stephen Winwood Dec., ECF No. 58 ¶ 4; Spenser Davis Decl., ECF No. 59 ¶¶ 3, 5.) The burden then shifted to Plaintiffs to set forth specific facts showing a triable issue of material fact. Plaintiffs only proffered inadmissible evidence to refute these facts Defendants set out in affidavit form. Plaintiffs also proffer no admissible evidence that Defendants infringed Plaintiffs' song between its release and Defendants' release, but rather contend it would have been possible. (ECF No. 64-6 at PageIDs 547-48.) Because Plaintiffs have failed to proffer any admissible evidence that establishes a genuine issue of material fact as to whether Defendants heard Plaintiffs' song prior to creating or releasing "Gimme Some Lovin'," the Court **GRANTS** summary judgment in favor of Defendants Steve Winwood and Kobalt (ECF No. 54).

IV. CONCLUSION

For the reasons stated above, the Court **DENIES** Defendants Steve Winwood and Kobalt's Motion to Dismiss (ECF No. 32); **GRANTS** Defendant Mervyn Winwood's Motion to Dismiss (ECF No. 76); **GRANTS** in part and **DENIES** in part Defendant Universal's Motion to Dismiss (ECF No. 38); and **GRANTS** summary judgment in favor of Defendants Steve Winwood and Kobalt (ECF No. 54).

IT IS SO ORDERED, this 17th day of October, 2017.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT COURT JUDGE